SUPREME COURT, U.S.
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No. 92-921

# In the Supreme Court of the United States

OCTOBER TERM, 1992

CALVIN SHIH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the statute of limitations in a prosecution for making a false statement under 18 U.S.C. 1001 begins to run before the documents in which the false statement is made are submitted to the government.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the judgment is noted at 935 F.2d 1294 and 1295 (Table). The order of the district court (Pet. App. 7-12) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 29, 1991. A petition for rehearing was denied on August 6, 1991 (Pet. App. 6). The petition for a writ of certiorari was filed on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to impede the collection of an import duty tax and to make false statements to the Customs Service, in violation of 18 U.S.C. 371; making a false statement to the Customs Service, in violation of 18 U.S.C. 1001; and making a false ocean bill of lading, in violation of 49 U.S.C. App. 121. He was sentenced to 18 months' imprisonment and a $10,000 fine. After sentencing, the district court granted a judgment of acquittal on the substantive counts on statute of limitations grounds. Both petitioner and the government appealed; the court of appeals affirmed petitioner's conviction on the conspiracy count and reinstated his convictions on the substantive counts. Pet. App. 1-5; Gov't C.A. Br. 3.

1. Petitioner and Jorge Rivero were involved in a scheme to transport merchandise into the United States without payment of import duties. Pursuant to the scheme, petitioner delivered a shipment of 1,194 cartons to Rivero on January 18, 1984. In accordance with petitioner's instructions, Rivero arranged for the shipment of 1,092 of the cartons to Kemtrade International Limited in New Jersey. To obtain custody of the merchandise without paying the duties required to be paid to import the merchandise into this country, Rivero arranged for Denizana Shipping to ship a substitute set of cartons to Belize, and he delivered to it documentation falsely indicating that the cartons would contain the merchandise Rivero had received earlier in January. On January 20, 1984, Denizana Shipping submitted to Customs officials an ocean bill of lading falsely indicating that it was exporting that merchandise. On

January 19, 1989, petitioner was indicted for his role in those events. See Gov't C.A. Br. 8-10.

2. After a jury found petitioner guilty on all charges, the district court granted petitioner's motion for a judgment of acquittal on the substantive counts. Pet. App. 7-12. The court explained that the last overt act of the conspiracy occurred on January 24, 1984, so that the conspiracy charge was not barred by the five-year federal statute of limitations. *Id.* at 9. On the substantive counts, however, the court concluded that the offenses were complete when Rivero submitted the false documentation to Denizana Shipping, even though the documents were not submitted to Customs officials until January 20. Because the documents were submitted to Denizana Shipping more than five years before the January 19, 1989, indictment, the court dismissed the substantive counts of the indictment. *Id.* at 9-11.

3. The court of appeals reversed. Pet. App. 1-5. The court explained that 18 U.S.C. 1001 makes it an offense "to make or cause to be made * * * a false statement of material fact on any matter within the jurisdiction of an agency of the United States" and reasoned that the offense is complete "when the false statement is submitted." Pet. App. 4 (quoting *United States* v. *Smith*, 740 F.2d 734, 736 (9th Cir. 1984)). Because the false statement in this case was submitted to Customs officials on January 20, 1984, the January 19, 1989, indictment was returned within five years of the date the offense was completed, and thus was timely. Pet. App. 4.

## ARGUMENT

Petitioner contends (Pet. 5-6) that the statute of limitations expired before his indictment under 18 U.S.C. 1001, based on his view that the offense was complete

when Rivero submitted the false documents to Denizana Shipping.[1] That contention is meritless.

As the Court has explained, limitations periods "normally begin to run when the crime is complete." *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). Section 1001 provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States * * * makes any false, fictitious or fraudulent statements or representations, * * * shall be [guilty of a crime]." Petitioner was charged with having aided and abetted a violation of that statute by his involvement in the scheme to cause Denizana Shipping to submit false documents to Customs officials.[2] Because the alleged statement was not made until the documents were submitted to Customs officials, the offense was not complete until that time. Because the documents were submitted to Customs officials on January 20, 1984—less than five years before the January 19, 1989, indictment—the indictment was timely under the general federal statute of limitations of 18 U.S.C. 3282.[3]

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[1] Although petitioner's brief argument might be construed to apply as well to his conviction under 49 U.S.C. App. 121, he does not cite that provision in his petition, or include it in his description of the statutes involved in the petition. Accordingly, we assume that the petition challenges only the conviction under 18 U.S.C. 1001.

[2] The indictment charged that petitioner

> did knowingly and willfully cause to be made, a false, fraudulent and fictitious statement and representation as to a material fact, in that the defendants caused the submission of an ocean bill of lading to be filed with the United States Customs Service which [contained specified false information].

Indictment 7.

[3] As the court of appeals noted (Pet. App. 5 n.5), petitioner arguably committed a separate violation of Section 1001 by causing Rivero to make false statements to Denizana Shipping, but the indictment did not charge him with that offense. See note 2,

Petitioner suggests (Pet. 5) that the decision below conflicts with *United States* v. *Smith*, 740 F.2d 734 (9th Cir. 1984). In that case, the defendants furnished false information to a pharmaceutical company, which relied on that information in submitting a false report to the Food and Drug Administration (FDA). The report was mailed on April 14, 1978, and received on April 20, 1978; the indictment was returned on April 19, 1983. 740 F.2d at 736. The Ninth Circuit held that the crime was complete when the pharmaceutical company mailed or submitted the false report on April 14, based on its view that receipt is not an essential element of the offense. *Ibid.* As a result, the court held that the indictment was returned outside the limitations period. 740 F.2d at 736-737. *Smith* is entirely consistent with the decision below. The Ninth Circuit in *Smith* assumed that the crime was complete when the pharmaceutical company mailed the false report to government officials, not when the defendants submitted the false information to the company. That reasoning would lead to the same result that the court of appeals reached in this case: petitioner's crime was complete only when the false information was submitted to the government.

Petitioner's reliance (Pet. 5) on *United States* v. *Balk*, 706 F.2d 1056 (9th Cir. 1983), is also misplaced. In that case, the Ninth Circuit upheld a conviction under Section 1001 based on false certifications made to Navy contractors regarding welding done in the course of ship repairs. The court explained that the defendant had violated Section 1001 even though the statements had not been made to the Navy; it was enough "that their in-

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*supra*. In any event, because that offense would have been complete when the documents were submitted to Denizana, an indictment for that offense would have been time-barred when the indictment in this case was returned. See Pet. App. 5 n.5.

tended use be related to a matter within the jurisdiction of the Navy." 706 F.2d at 1059. *Balk*'s only relevance to petitioner's offenses is to support the point made above, see note 3, *supra*, that petitioner arguably violated Section 1001 by assisting Rivero in making false statements to Denizana Shipping, on the theory that those statements concerned a matter within the jurisdiction of the Customs Service. Because petitioner was not charged with that offense, but with the separate offense of assisting in the making of false statements to the Customs Service by Denizana Shipping, *Balk* does not support petitioner's argument.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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